

Issue Paper

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Drug Offenders and the Criminal Justice System Will Proposition 36 Treat or Create Problems?

*K. Jack Riley, Patricia A. Ebener, James Chiesa,
Susan Turner, Jeanne Ringel*

IP-204

RAND Criminal Justice

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Published 2000 by RAND

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*Prepared for the
RAND Criminal Justice*

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ACKNOWLEDGEMENTS

A great number of people contributed their time and energy to this project. We owe thanks to the staff at the Legislative Analyst's Office for their willingness to review their fiscal estimates with us on multiple occasions. We would also like to acknowledge the prompt and expert assistance received from Susan Nissenbaum and Sally Jew from the California Department of Alcohol and Drug Programs and from Haikang Shen and Yen Cao, our colleagues at the University of California, Los Angeles.

We also appreciate the cooperation of Cliff Gardner, Dave Fratello and Scott Ehlers from the "Yes on Prop 36" campaign and Dan Abrahamson from the Lindesmith Center's Office of Legal Affairs in San Francisco for meeting with us to explain the initiative. A number of treatment providers and elected officials also shared their support for the proposition with us.

We also discussed the initiative with a number of individuals opposed to Proposition 36. Our discussions in this regard included numerous judges, prosecutors, drug court personnel and treatment providers. We appreciate their participation.

We owe special thanks to Jim Osterholt and his RAND Development team for supporting our preparations for a RAND Policy Forum on Proposition 36. Likewise, we are grateful to two anonymous RAND reviewers for their thoughtful comments on the first draft of this report.

There was no shortage of opinions on the proposition. Consequently, we continued our work on this until the last possible moment. Thus, although this report has been subjected to review by both proponents and opponents of the proposition, and to academic peer review, it has not received final editing and proofing. We attempted to minimize the number of typographical errors and impose some consistency in terms of reference style and grammar, but we undoubtedly did not succeed in every regard.

| | |
|--|------------|
| ACKNOWLEDGEMENTS..... | III |
| OVERVIEW OF PROPOSITION 36 | 1 |
| Analyzing Proposition 36: Key Issues and Questions | 3 |
| In Their Own Words | 5 |
| Proponents' View..... | 6 |
| Opponents' View | 6 |
| Legislative Analyst's Office Fiscal Assessment | 7 |
| ANSWERING THE KEY QUESTIONS | 10 |
| How Many Offenders Will Be Eligible? | 10 |
| Arrests | 11 |
| Sentences | 11 |
| Social Costs and Benefits of Proposition 36..... | 13 |
| New Crimes..... | 13 |
| Treatment's Impact on Crime..... | 14 |
| The Impact of Proposition 36 on the California Treatment System..... | 18 |
| Changes in the Mix of Treatment Needs..... | 18 |
| Treatment Capacity..... | 19 |
| Quality of Care | 20 |
| Some Treatment Cost Scenarios | 21 |
| High Treatment Need Scenario | 22 |
| Modest Treatment Need Scenario..... | 22 |
| Scenario Implications..... | 24 |
| Response of Criminal Justice System Actors | 24 |
| The Three-Strikes Example | 25 |
| Discretion under Proposition 36 Language | 27 |
| The Frequency of Possession-For-Sale Charges May Increase..... | 28 |
| The Percentage of Simple-Possession Cases Going to Trial will Change Substantially..... | 28 |
| More Co-occurring Charges May Be Filed..... | 29 |
| Some Persons Diverted will Escape the Initiative's Sanctions..... | 30 |
| Discretion Inherent in Implementation..... | 30 |
| SUMMARY AND RECOMMENDATIONS..... | 31 |
| Summary | 31 |
| Number of Eligible Offenders..... | 31 |
| Social Costs and Benefits..... | 32 |
| The Proposition's Impact on the California Treatment System..... | 33 |
| Criminal Justice System Reaction..... | 34 |

| | |
|---|-----------|
| Recommendations | 35 |
| If Proposition 36 Fails | 35 |
| Conduct a Pilot | 35 |
| Analyze the Adjudication Experience of the Typical Drug Offender..... | 36 |
| Analyze Probation..... | 36 |
| Evaluate Current Treatment Efforts | 36 |
| If Proposition 36 Passes | 37 |
| Establish a Baseline | 37 |
| Conduct A Treatment Needs Assessment | 37 |
| Eliminate the Drug Test Exclusion or Provide Drug Testing Funds | 38 |
| Establish Procedures for Monitoring Treatment Quality..... | 38 |
| REFERENCES | 40 |

OVERVIEW OF PROPOSITION 36

Over the past 20 years, penalties for drug-related crimes have been growing stricter, with the result that 30 percent of prison inmates in California (and a similar percentage nationally) are there on drug charges. Some of those are there on simple possession or use charges, unrelated to any attempt to sell drugs or pursue other criminal activity. Views about the propriety of such sanctions vary, but some believe such punishments are unwarranted by the crime and that too much public money is being spent incarcerating what they see as minor, largely harmless offenders. Enough people take this viewpoint to have qualified a proposition for the November 2000 California ballot that addresses this situation. The ballot measure is known as Proposition 36.

The California Legislative Analyst's Office has developed a succinct definition of Proposition 36:

"Under this proposition ... an offender convicted of a 'nonviolent drug possession offense' would generally be sentenced to probation, instead of state prison, county jail, or probation without drug treatment. As a condition of probation, the offender would be required to complete a drug treatment program."

In other words, Proposition 36 is a post-conviction program that would divert eligible offenders from prisons, jails and non-treatment probation sentences to probation with terms of treatment. Offenders *previously* convicted of violent or serious crimes, individuals *concurrently* convicted of a felony other than a non-violent drug possession offense, and individuals *concurrently* convicted of a misdemeanor not related to the use of drugs are ineligible for Proposition 36. Various sections of the California penal code define violent and serious offenses rather broadly, including injurious assault, most robberies and burglary of a residence.

Eligible offenders choose to participate in the program only after they are convicted and the potential consequences of their conviction are clear. If the offenders refuse to participate in the program, offenders are then given the sentence appropriate for their possession or use offense. Many marijuana offenders, for example, are expected to decline to participate in Proposition 36 because the penalty for possession of an ounce or less of marijuana is a \$100 fine, an outcome that offenders are likely to find substantially less onerous than the Proposition 36 treatment requirements.

Participation in the program is considered a term of probation for offenders who participate.¹ The proposition is silent about how offenders' treatment needs will be assessed, but the course of therapy is expected to be made in the form of a recommendation to the court. The initiative does not specify procedures for ensuring the quality of the treatment provided, other than requiring "licensing and/or certification." The initiative sets no minimum requirement for the length of the treatment period, but it establishes the maximum as 12 months.

Probation officers monitor the offenders' compliance with participation in the program and other conditions of probation.² Probation officers have wide latitude with respect to requesting the revocation of probation. A probation officer can recommend revocation of probation for violation of almost any probation condition.³ The addition of the Proposition 36 conditions to probation does not change the probation officers' discretion; probation can be revoked the first time a probation officer detects a violation of Proposition 36 conditions if the offender is deemed to be a danger to others. In reality, the more likely, and desired, according to Proposition 36 supporters, outcome is placement of the offender in a new treatment program.

The second time an offender is caught violating the Proposition 36 conditions of probation, it is easier, but not automatic, to impose conditions of custody. Upon the third failure of Proposition 36 conditions, the offender is permanently kicked out of the program and current law applies.

Upon successful completion of treatment under Proposition 36, the offender can petition to have the original conviction charges dismissed and the arrest "deemed never to have occurred".⁴ The arrests and convictions, however,

¹ Current typical terms for non-violent offenders include: consent to search without warrant at any time; report to probation officer per schedule; periodic drug testing; and the requirement for the probationer to use his or her appropriate given name at all times.

² The process works similarly for imprisoned individuals released into the community on parole. Parole participants can have no prior history of convictions for serious and violent crimes. Upon release to participation in the program, parolees are monitored by parole agents rather than probation officers. Parolees are removed from the program, and thus eligible for return to custody, after their second violation of program sanctions; violation of other parole conditions can result in their return to custody at any time.

³ For purposes of this report, "probation" conditions refers to all conditions of probation not resulting from Proposition 36. In contrast, "Proposition 36 conditions" refers to the probation conditions deriving from Proposition 36, most notably that the individual must follow the prescribed course of treatment.

⁴ The full text of the initiative can be obtained from <http://www.drugreform.org/fulltext.tpl>.

can be recorded by the Department of Justice and must be disclosed in applications for public office or peace officer positions and in certain other circumstances.

Analyzing Proposition 36: Key Issues and Questions

In the tradition of previous RAND research evaluating the California three-strikes initiative in 1994, RAND Criminal Justice has conducted an independent analysis of Proposition 36--what can and cannot be said about its effects on the basis of readily available information. We begin our analysis of Proposition 36 with a proposition: no ballot initiative can perfectly anticipate all of the issues associated with implementation. The correct standard by which to judge an initiative is therefore not by what supporters or opponents say, nor even by the explicit language of the initiative, but by the impact that the initiative can be expected to have in its operating environment. Proposition 36 does not create a separate implementation entity; there is no commission or organization to interpret intent and give guidance to prosecutors, the courts, probation and parole and treatment providers. What happens to the criminal justice and drug treatment provider systems if Proposition 36 passes, therefore, depends substantially on how these two systems are currently constituted and how the actors in the system respond. We undertake this analysis in an effort to better understand how Proposition 36 will function in the larger context of California's existing criminal justice and drug treatment programming.

Drugs and Crime in California

There is no denying that a strong link between substance abuse and offending exists. Data from the National Institute of Justice's Arrestee Drug Abuse Monitoring (ADAM) program show that approximately 2 out of 3 suspects in Los Angeles, Sacramento, San Diego, and San Jose test positive for at least one drug at arrest.⁵ Marijuana is usually the drug most frequently detected, but in 1999 more than one-third tested positive for cocaine in Los Angeles; more than 25 percent tested positive for methamphetamine in Sacramento; and nearly 10 percent tested positive for opiates in San Diego. Although the drug detection rates are usually highest among suspects arrested on drug charges (both possession/use and sales), substantial percentages of those arrested for violent and property crimes also test positive for drugs. More than 25 percent of the arrestees interviewed in the CalDUF

⁵ National Institute of Justice (2000).

program self-report the need for treatment. Among those arrested on drug possession charges, nearly 40 percent report the need for treatment.

Providing drug treatment to those who are incarcerated is one response to drug problems among the criminal justice population. This approach is serving only a small percentage of the estimated one million inmates nationwide who need treatment for drug problems. In California in recent years in-prison treatment capacity has greatly expanded from about 500 beds in 1997 to over 9000 projected for 2002.⁶ In-prison treatment programs have received favorable evaluation,⁷ but some observers have argued that too rapid expansion of in-prison treatment might result in a lower quality of treatment.⁸ In either case, in-prison treatment is an expensive option because it is delivered on top of the annual average yearly cost of \$21,243 to incarcerate an inmate in a California state prison.⁹

The RAND Analysis

Analysis in support of making a decision as to whether or not to support the proposition needs to provide information on fiscal and other impacts. Among the other impacts that merit consideration are reduced criminality and drug use resulting from treatment instead of incarceration, the savings from averted incarceration costs, and the costs of running the program, together with any reductions in these benefits and costs occasioned by reactions to the proposition within the criminal justice and treatment systems. Analysis of the potential impact of Proposition 36 therefore depends on estimating a number of different effects that the proposition might have, including:

- The number of eligible offenders;
- The social costs and benefits derived from Proposition 36;
- The impact of Proposition 36 on the treatment system;
- The behavior of key participants in the criminal justice system in response to the proposition.

⁶ Clavecilla and Lowe (1999).

⁷ Inciardi, (2000); Lowe, Wexler and Peters (1998).

⁸ See Fabelo (1995).

⁹ *CDC Facts* (2000).

The number of eligible offenders drives the estimates of projected savings from diverted incarcerations. Proponents have touted the potential savings calculated by the LAO as a key benefit of the initiative. The number of eligible offenders tells only part of the story, however. The other part of the story is how the offenders' behavior changes both the social costs (such as crimes committed while out on probation) that could have been avoided by incarceration and the social benefits (such as potential collateral reductions in crime from treating drug use) derived from treating offenders' addictions. We cannot cover all of these costs and benefits in this analysis, but we will highlight two:

- Potential detrimental effects associated with further crimes committed by the portion of Proposition 36 program participants that would not have been committed had they been incarcerated as under current law. Proposition 36 denies eligibility for participation to offenders with certain co-occurring or previous offenses, but it allows eligibility to persons who might have extensive non-drug-related criminal histories and thus propensities to commit further crimes.
- Any beneficial effects of treatment on the propensity of Proposition 36 program participants to commit future crimes. Lower tendency to use drugs is associated with lower criminality; we discuss this only with respect to the possibility of lower criminal justice system costs in the future, though other treatment benefits would be expected if criminal behavior is reduced.

The proposition has multiple potential implications for treatment, including potential changes to the mix of clients entering public treatment, the treatment system's ability to absorb the new clients, the quality of treatment provided under Proposition 36, and the estimated costs of delivering treatment to Proposition 36 clients. Finally, the behavior of key criminal justice and treatment officials is important because their actions undermine or augment the intended consequences of the proposition.

After brief descriptions of how the proponents and opponents view the proposition, and an overview of the official state fiscal impact estimate, the balance of the paper considers the four issues outlined above.

In Their Own Words

As part of this project, we interviewed both supporters and opponents of the initiative. As might be expected, the sides have widely diverging views of what Proposition 36 will accomplish. We begin with a summary of what

leading advocates for and against Proposition 36 have to say. We supplement their views with the official State fiscal impact assessment provided by the Legislative Analyst's Office, as it provides a convenient launching point for discussion.

Proponents' View

Proponents of Proposition 36 argue that drug treatment has proven, positive effects on public safety and health. In particular, they argue that non-violent offenders who receive drug treatment are much less likely to abuse drugs and commit future crimes, and are likelier to live healthier, more stable and more productive lives with the benefit of treatment.

While treatment can be obtained in many contexts – behind prison bars, in jails, and in the community – Proposition 36 supporters argue that incarceration-based forms of treatment are wasteful because they require expensive incarceration.¹⁰ Supporters argue that safety and public health goals can be augmented and taxpayer dollars saved if offenders can be diverted to appropriate community-based treatment instead of being incarcerated.

Thus, the supporters of Proposition 36 anticipate that it will “halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration – and re-incarceration – of non-violent drug users who would be better served by community-based treatment;” and “enhance public safety by reducing drug-related crime and preserving jails and prison cells for serious and violent offenders, and to improve public health by reducing drug abuse and drug dependence through proven and effective drug treatment strategies.”¹¹

Opponents' View

The opposition to Proposition 36 argues that the measure is a back door to drug legalization and that it undermines the impact of other drug control methods, including drug courts. Opponents argue that few true “possession only” offenders are actually imprisoned, and that many of the offenders currently imprisoned for such charges in fact plea-bargained down from more serious offenses.¹² Other opponents argue that the probation

¹⁰ As noted earlier, the California Department of Corrections (CDC) estimates that each person-year of incarceration costs more than \$21,000.

¹¹ These objectives are found in the text of the initiative at <http://www.drugreform.org/fulltext.tpl>.

¹² Orloff (2000).

departments are ill equipped to handle the influx of new clients, and that many probation agencies are already suffering from staffing shortages.

Critics of Proposition 36 also contend that the initiative does not provide for effective treatment oversight. Many are concerned about the quality of treatment that will be offered under the proposition and are particularly concerned that proposition funds cannot be used for drug testing. In the opponents' view, this constitutes an unfunded mandate if officials are to adequately monitor offenders in community-based treatment. Opponents argue that the treatment system created by Proposition 36 substantially weakens treatment oversight and offender accountability.

Critics are also concerned that the projected savings will be reduced by:¹³

- Increases in adversarial court proceedings for Prop 36 participants who do not succeed on treatment;
- Direct increases in probation case loads.

Another argument made by opponents is that the initiative results in the ineffective use of court, treatment, parole and probation resources on individuals who either do not have an addiction problem or are not amenable to treatment. In other words, they argue that the Proposition is indiscriminate in the opposite direction of current sentencing and incarceration patterns, resulting in the application of a tool [treatment] that may not be appropriate for every eligible offender.

Legislative Analyst's Office Fiscal Assessment

The LAO is obligated to assess fiscal effects for each of the propositions that qualify for the ballot. In estimating fiscal effects, however, the LAO can often reveal other impacts that might result from the passage of a proposition. For Proposition 36, the LAO estimated:

- Savings to the State Prison System of \$200 million to \$250 million annually from the diversion of as many as 24,000 nonviolent drug

¹³ See for example "Substance Abuse and Crime Prevention Act of 2000: Analysis and Recommendation," prepared by the Countywide Criminal Justice Coordination Committee of Los Angeles County (2000).

possession offenders (the equivalent of 11,000 beds) to probation with treatment¹⁴;

- Savings to the State Prison System of \$450-\$500 million by averting the need to build additional prisons to accommodate offenders that would have been sentenced under the old system;
- Savings to the State Parole System of \$25 million from diverting an estimated 9,500 offenders from entering state custody as prison inmates, resulting in fewer offenders that would eventually be released from state prison to state parole supervision;
- Total (statewide) savings of \$40 million to County Jails by diverting about 12,000 eligible offenders annually from jail sentences to probation supervision and drug treatment in the community. These savings would decline to the extent that jail beds no longer needed for drug possession offenders were used for other criminals who are now being released early because of a lack of jail space;
- Revenues from the Treatment Trust Fund (\$60 million from the state General Fund for the 2000-01 fiscal year, and \$120 million each year until the 2005-06 fiscal year) to county governments to offset their costs of implementing this measure. Acceptable costs include increased probation caseloads, substance abuse treatment, court monitoring of probationers, vocational training, family counseling, literacy training, and compliance with the state reporting requirements. None of the money could be used for drug testing of offenders.
- Revenue from fees paid by offenders, perhaps amounting to several million dollars, from offenders required to contribute to the cost of their drug treatment programs;
- Savings at the trial court level (unknown, but estimated to be several million dollars annually) because fewer offenders facing nonviolent drug possession charges would contest those charges at trial. Trial savings to the state could be offset by an unknown, but probably small, amount for additional court costs to monitor treatment compliance by diverted offenders.

¹⁴ The range reflects uncertainty over how counties would implement the measure and the effectiveness of treatment, possible changes in the way prosecutors and judges handle drug cases, such as changes in plea bargaining practices, and uncertainty about the number of Three Strikes cases affected by the measure.

- Savings in health care, public assistance, and law enforcement programs if the measure succeeds in reducing substance abuse (the amount of such potential savings was not estimated)

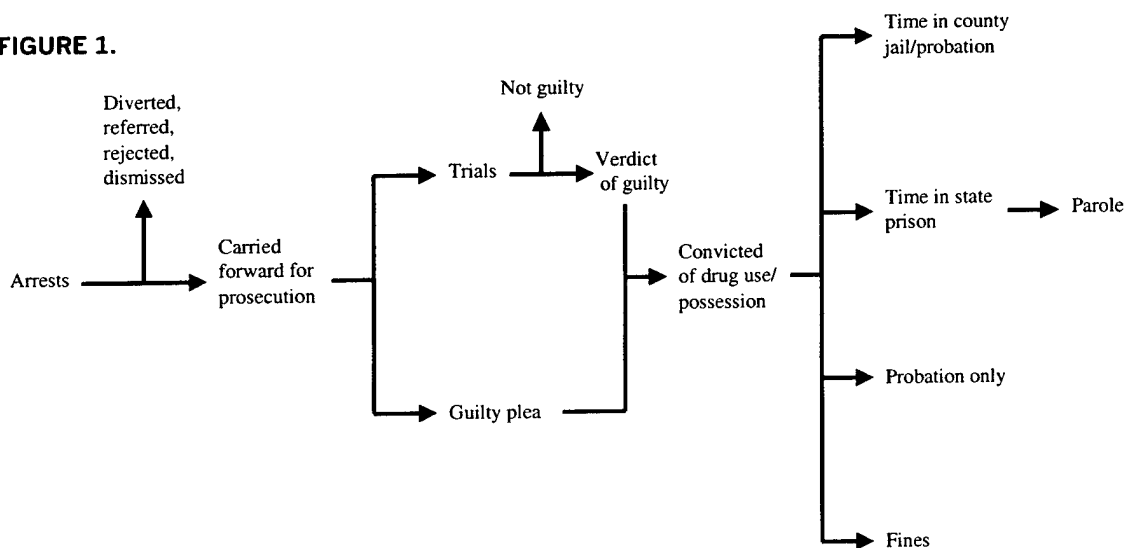
These savings would be partly offset to the extent that the offenders diverted to the community under this measure later commit additional crimes that result in their commitment to state prison.

ANSWERING THE KEY QUESTIONS

How Many Offenders Will Be Eligible?

As might be expected, there is substantial uncertainty associated with the LAO estimates about the number of eligible offenders. Figure 1 shows where in the current criminal justice system Proposition 36 offenders (i.e. individuals convicted of drug use or possession) would come from. In California for 1999, there were more than 1.5 million arrests, the number of prison inmates as of April 1, 1999 was 160,332,¹⁵ jails housed an average daily population of 76,312,¹⁶ more than 330,000 individuals were on probation and more than 114,000 on parole.¹⁷

FIGURE 1.



¹⁵ Offender Information Services Branch, California Department of Corrections.

¹⁶ California Board of Corrections, Jail Profile Survey (1998).

¹⁷ Bonczar and Glaze (2000).

The following section briefly reviews the flow of drug defendants through the criminal justice system for 1998, the latest available year for which data are generally available.

Arrests

More than 1.5 million arrests occur in California annually, representing an unknown unique number of individuals. Of these for 1998, 869,612 were arrests of adults for misdemeanors. Certain drug offenses fall in the misdemeanor category, including 32,595 for marijuana use or possession and 73,208 for other drugs.

The balance of the arrests, approximately 500,000, is for felonies. Drug offenses, including drug trafficking and drug possession, account for about 31 percent of adult felony arrests. Crimes against persons represented the next largest share of adult felony arrests, at nearly 29 percent. In total, these were almost 250,000 (105,000 misdemeanor and 142,000 felony) arrests for drug offenses in California in 1998. However, as shown in Figure 1, there are several paths that arrests can take through the criminal justice system and data are not available to track the outcomes of all drug arrests. Moreover, an unknown portion of the drug arrests occurs in combination with other offenses that would exclude an offender from Proposition 36 eligibility. Because of these problems with projecting from arrests, LAO used an alternative strategy of projecting from the total population of sentenced adults.

Sentences

Based on discussions with LAO analysts, we found the estimation methods that LAO used were reasonable.¹⁸ In essence, LAO attempted to estimate the number of drug possession and drug use offenders that received probation with jail, jail, or prison sentences for their offense; and the comparable population that was paroled from prison for those offenses.

To estimate the number of offenders that might be diverted from prison, the LAO used computer runs from the California Department of Corrections that described the current inmate population. These runs were sorted by other contemporaneous convictions so that offenders with *contemporaneous* disqualifying convictions could be eliminated. Assumptions were then made about conviction *histories* to further refine the estimate in accordance with Proposition 36 eligibility rules. Adjustments to reflect potential changes in

¹⁸ Personal correspondence between authors and LAO, September 12, 2000 and October 11, 2000.

potential prosecution strategies were made. After adjustments, LAO estimated that approximately 24,000 offenders would be diverted from prison annually. The LAO estimate of 24,000 diversions includes both judicial diversions of offenders facing new criminal charges and Board of Prison Terms diversions of parole violators from prison.¹⁹

In general, the prison diversion number is the most solid of the series provided by the LAO, as it is the series for which the best data are available. It should be pointed out, however, that the LAO estimate is based on official prison data that do not reflect plea-bargaining, which occurred prior to sentencing. The LAO then applied some assumptions about how plea bargaining and other behaviors might change after Proposition 36, resulting in a lower estimate of diversions. Some California District Attorneys have pointed out that *most* offenders imprisoned on a top charge of drug use or possession in fact pled down from a felony that would disqualify them from Proposition 36.²⁰ In other words, they question whether the LAO assumption was sufficiently aggressive.

Estimating the number of diversions from jails was the most difficult part because little of the relevant information is readily available. Generally, LAO was forced to rely on old data. Specifically, the LAO used the last year (1993) for which the Administrative Office of the Courts published statewide sentencing data, and this was used to determine the ratio in which drug offenders were sentenced to jail or prison. Since California no longer collects these data, the LAO assumed that this historic split still applies. Using the ratio, LAO first estimated (rather than counted, which was not possible) the potential eligible offenders in jail. This number was subsequently reduced to account for various factors, including criminal history, contemporaneous convictions and so forth. The result was an estimated 12,000 annual diversions from jails.

Finally, there is a portion of the criminal justice population that will be eligible for treatment but is not included in the LAO estimates since that portion does not represent potential diversions from jail or prison. Misdemeanants who previously received probation only would be legible for probation plus treatment. These offenders do not affect the fiscal estimates (which is the LAO's charge) because they would not have gone to prison or

¹⁹ Personal correspondence with LAO, October 13, 2000.

²⁰ Orloff (2000). See also California Narcotic Officers Association and The California District Attorneys Association (2000).

jail and therefore cannot be counted as diversions that save incarceration expenses. Depending on conviction and treatment acceptance rates, tens of thousands of additional individuals might be included in the Proposition 36 pool.

Social Costs and Benefits of Proposition 36

There are a number of potential cost effects that Proposition 36 might have beyond direct budget expenditures and incarceration savings estimates. Such costs reflect secondary effects that the proposition might have and are usually referred to as the social costs (or benefits). Examples include the cost of crimes committed by Proposition 36 probationers while in the community and benefits from improved public health or reduced health costs derived from treating drug users. Considering all of these social costs is beyond the scope of this analysis. Instead, we consider the social costs and benefits related to crime under Proposition 36. Specifically, we consider new crimes potentially committed by probationers while on release and potential decreases in crime resulting from treatment.

New Crimes

New crimes are generated if offenders who formerly would have been incarcerated, and therefore would have been incapacitated, commit criminal acts while in treatment. Those diverted from prison or jail are a small portion of the total criminal justice population but if they had been incarcerated they would produce no new crime during the period of their sentence.

Very little information exists on what kinds of crime Proposition 36 offenders might commit while they are on release. There is some reason to expect that some portion of Proposition 36 offenders will be involved in criminal activity while they are undergoing community-based treatment. At a minimum, Proposition 36 offenders will have demonstrated a willingness to participate in black markets to purchase illegal drugs. In a study of more than 2000 arrestees from 6 cities who reported using crack, powder cocaine and heroin in the 30 days preceding their arrest, high percentages – typically 20 percent or more – reported drug dealing or other illegal activity as their *main* source of monthly income.²¹ Generally, the more frequent the drug use, the more likely the offender was to report being involved in drug sales.

²¹ Riley (1997).

Some of the other illegal income-generating activities that were frequently reported included prostitution, benefits fraud and property crime.

We know from previous work done in California that 65 percent of the felons on probation in Los Angeles and Alameda Counties were re-arrested during the course of their probation terms.²² We also know that about one-third of intensively-supervised offenders in Los Angeles, Contra Costa and Ventura counties were re-arrested 12 months after sentencing. Between 41 and 73 percent had new technical violations, primarily failure to appear for probation appointments, failure to participate in treatment, or violating drug-related conditions (usually drug use as detected through urinalysis).²³ About half of these offenders had "high" drug treatment needs.

A more recent study shows a link between drug use and property crime among suburban probationers.²⁴ The population in the suburban study is not strictly comparable to the Proposition 36 population, as it includes a range of offenders who would be ineligible for Proposition 36. Nevertheless, the analysis reinforces the fact that some probationers do in fact commit crimes while on release.

Were Proposition 36 offenders ever to be arrested for such actions, probation could be revoked. These figures, of course, do not account for other types of crimes that Proposition 36 participants might commit, including crimes against persons.

Treatment's Impact on Crime

Substance abuse treatment has been shown to be effective in reducing both subsequent drug use and subsequent criminal activity. The National Institute on Drug Abuse (NIDA) has distilled the research literature and identified the elements crucial to treatment effectiveness:²⁵

- No single treatment is appropriate for all individuals
- Treatment needs to be readily available

²² Petersilia et. al (1985).

²³ Petersilia and Turner (1990).

²⁴ Di Li, Priu and MacKenzie (2000).

²⁵ NIDA (1999). See also Taxman (1999), for an overview from a criminal justice perspective.

- Effective treatment attends to multiple needs of the individual, not just his or her drug use
- An individual's treatment and services plan must be assessed continually and modified as necessary to ensure that the plan meets the person's changing needs
- Remaining in treatment for an adequate period of time is critical for treatment effectiveness
- Counseling (individual and/or group) and other behavioral therapies are critical components of effective treatment for addiction
- Medications are an important element of treatment for many patients
- Addicted or drug-abusing individuals with coexisting mental disorders should have both disorders treated in an integrated way
- Medical detoxification is only the first stage of addiction treatment and by itself does little to change long-term drug use
- Treatment does not need to be voluntary to be effective. Strong motivation can facilitate the treatment process
- Possible drug use during treatment must be monitored continuously
- Treatment programs should provide assessment for HIV/AIDS, hepatitis B and C, tuberculosis and other infectious diseases
- Recovery from drug addiction can be a long-term process and frequently requires multiple episodes of treatment.

Representatives from the criminal justice treatment community place emphasis on additional elements, the need for incentives and sanctions. Most in the criminal justice treatment community agree that sanctions are a useful tool for re-directing offenders who slip from a course of treatment. In general, research has shown the utility of applying sanctions *swiftly* and *certainly*, with *progressive* severity, for a schedule of clearly delineated *transgressions*.²⁶ This structure is found most clearly in drug courts.²⁷ One of the chief advantages that drug courts seem to offer is that the close supervision provided, including comprehensive oversight and frequent drug

²⁶ Taxman (1999).

²⁷ National Drug Court Institute (1999).

testing, appears to be more effective than other forms of community supervision.²⁸

Substance use is associated with criminal activity. As such, if drug use is reduced we would expect to see reductions in criminal activity as well. A California evaluation found that criminal activity declined by two thirds based on a pre-post treatment comparison.²⁹ Reduced crime has been found in many treatment evaluations, including the NTIES.³⁰ The NTIES estimates indicate that criminal activity falls significantly after drug treatment. Arrests for any charge were reduced by 64 percent after treatment. Data from the National Treatment Improvement Evaluation Study (NTIES) show that clients had reduced their drug use by approximately 50 percent at a one year follow up after treatment. The efficacy of treatment is consistent across drug types with clients having a 50 percent reduction in crack, cocaine, and heroin use. It is important to note that while the data reported in the NTIES is based on self-reported drug use, they have been validated using urine tests. The study finds that some under-reporting of recent use (last 30 days) occurs, but that none is found for use over the longer term. In addition, the NTIES shows that drug treatment is associated increased labor market participation, reduced welfare dependency, and decreased homelessness.

The effectiveness of drug treatment in reducing drug use and criminal activity varies across treatment modality and, perhaps, length of treatment. A 1994 report by Gerstein et al for the California Department of Alcohol and Drug Programs provides information on the variations in treatment efficacy. The California Alcohol and Drug Treatment Assessment (CALDATA) reports that while all modes considered significantly decreased drug usage, methadone maintenance and residential treatment had the largest impact (-67 percent and -51 percent respectively). Length of treatment has also been associated with treatment success. For all modes, greater reductions in drug use were found for clients that had greater lengths of treatment.³¹ The reductions in criminal activity reported in the CALDATA study follow the same pattern. The treatment modalities that reduce drug use the most also have the greatest effect on subsequent criminal activity. For clients in residential treatment, criminal activity was reduced by 74 percent after drug

²⁸ Belenko (1998).

²⁹ Gerstein et al. (1994).

³⁰ California Legislative Analyst's Office (1999).

³¹ McClellan et al., (1996).

treatment. Increases in length of treatment may also lead to increases in efficacy. Among those clients that received one month or less of methadone maintenance criminal activity fell by 70 percent. In contrast, crime was reduced by 81 percent for those clients that received the same treatment for four or more months.

The results regarding the effectiveness of drug treatment cited above are based on studies of clients the majority of whom voluntarily sought treatment and they are not based on comparison groups. The effectiveness of drug treatment depends on many factors including the severity of the drug problem and an individual's desire to reduce drug use or the treatment program's ability to motivate a client early in their treatment to reduce drug use. The Proposition 36 population entering treatment may not do as well as the treatment clients included in prior evaluations either because their drug use problems are more severe or they are less motivated than the general treatment population. One of the big unknowns with Proposition 36 offenders is how long they will stay in treatment, particularly if they are receiving low oversight.

In recent years, there has been a growth in the literature on quantitatively evaluating the costs and benefits of drug treatment. Most studies have found that drug abuse treatment is both effective and cost-effective.³² The CALDATA report finds that while all modes of treatment are cost effective, methadone maintenance provides the largest benefit to cost ratio at 4.66.³³ The other modes of treatment provide approximately \$2.50 in benefits for every dollar of cost. Rydell and Everingham (1994) find that even though a significant number of clients relapse into drug use after treatment, cocaine treatment can be cost effective. The benefits arise because offenders reduce their drug use (and potentially other behaviors such as criminality) for the duration of their treatment. Thus, even if offenders' behavior does not change in the long run (that is, after the conclusion of treatment), some benefits are still captured while the offenders participate in treatment. For example, only 39 percent of drug use arrestees in California self-report that they could use treatment for their drug use. It may be that the results from the NTIES and CALDATA should be considered as upper bounds on treatment effectiveness. As such, reductions in drug use and subsequent criminal activity experienced under Proposition 36 could be somewhat lower than what was found in the previous studies.

³² Gerstein et al., (1994); Rydell and Everingham, 1994.

³³ Gerstein et al., (1994).

The Impact of Proposition 36 on the California Treatment System

Currently, on an average day in California nearly 1500 community-based facilities provide approximately 126,000 clients with drug treatment.³⁴ Tabulations from the California Alcohol and Drug Data System (CADDs) indicate that there are about 200,000 new admissions to drug and alcohol treatment programs each year, about a third for heroin treatment and a quarter for alcohol. In recent years, between 20-24% of total admissions to publicly-funded treatment in California come from criminal justice referrals.³⁵ The current pattern represents a slight increase over an earlier period (1985-1987) when the proportion from the criminal justice system ranged between 17 and 19% of all admissions. Total admissions have doubled since 1985 when there were 97,000 statewide. Thus, while increases in criminal justice referrals have contributed to treatment growth, they have not accounted for most of the increase.

Treatment providers in California have responded to new mandates in the past and the opportunity to expand their programs to serve new clients will be welcome by many. But how they will respond to several new challenges associated with Proposition 36 referrals and how their responses will affect the quantity and quality of treatment is currently a large unknown.

Changes in the Mix of Treatment Needs

The treatment needs generated by Proposition 36 may change the mix of clients referred to treatment in addition to representing a substantial increase in the total number of clients served. Existing criminal justice referrals report a diverse range of primary substance abuse problems. About one-third report amphetamines as their primary problem, and another 25 percent report alcohol. Roughly 15 percent report cocaine/crack, and roughly 18 percent report marijuana. Approximately 9 percent report heroin as the primary drug of abuse. Generally, criminal justice referrals report infrequent use, including nearly 40 percent who report no past month use³⁶.

³⁴ Uniform Facility Data Set, 1998.

³⁵ The balance of this section is from the California Alcohol and Drug Data System (CADDs), California Department of Alcohol and Drug Programs.

³⁶ This number is likely to be biased because offenders on probation or parole are likely to be reluctant to admit drug use out of fear of repercussions, or it is possible that many criminal justice referrals have spent time in prison or jail in the months prior to their treatment admission, in which case their rate of use would be lower than the general population entering treatment.

Current CADDs data suggest that criminal justice referrals are different in some ways from the rest of the referral population. For example, a substantially lower percentage of criminal justice referrals than general population referrals reports heroin as the primary drug of abuse. In contrast, much larger proportions of criminal justice referrals report amphetamine problems than the general treatment population. In addition, the age of first use is younger for the criminal justice referrals, they are less likely to have a high school diploma, the number of drug problems they report is greater and they report fewer prior episodes of treatment. Such differences, if they are present in the Proposition 36 referrals, may change the demands on the treatment system in several ways.

If the clients are different there may be a need to adjust the mix of programs available. For example, currently there are 146 methadone programs and about 75,000 heroin admissions to treatment a year. Less than half that many are receiving amphetamine treatment and we suspect that few programs specialize in treatment for amphetamine dependence. Thus the treatment community may be unprepared for a large influx of amphetamine addicts. Programs that specialize in treatment for heroin, e.g. the methadone programs, may not be able to serve the new demand. Other differences could emerge that will create a need for different kinds of programs. For example the Proposition 36 population may include a large portion of women with children, or non-English speakers or persons with dual diagnosis. The lack of a needs assessment leaves the programs in a poor position for planning for needed services.

Finally, if Proposition 36 clients prove to have different problems (less education, more severe drug dependence, and other factors that CADDs data suggest) programs will need to change their mix of services their programs offer to include more intensive treatment and other services such as job training which few currently offer.

Treatment Capacity

With respect to capacity, data from the Uniform Facility Data Set (UFDS), a survey of substance abuse treatment facilities, indicate that existing treatment facilities are operating at or near full capacity. In the case of residential treatment programs, 87 percent of beds are being utilized. In addition, approximately 60 percent of all facilities that maintain a waiting list for treatment if the facility is full have people on their list. On average there are 23 people per waiting list. These statistics suggest that there is not much excess capacity that exists in the current substance abuse treatment community. A 1999 report from the California LAO found that treatment capacity in California is insufficient; it found that waiting lists understate

actual demand for treatment and that the system is under-funded by about \$330 million.³⁷ In order to accommodate a large new influx of criminal justice clients, the treatment system which is already over capacity in California will have to grow significantly more.

Even with a funding stream to support the cost it is not clear that the supply will be nearly adequate in the short term. The supply of treatment cannot be adjusted quickly. It takes time for new facilities to form, obtain licensure from the state, and hire and train staff. During the time it will take for the supply of treatment to expand, the increased demand for services may cause higher prices for treatment to emerge. It is not clear which clients (criminal justice referrals, motivated private parties, Proposition 36 referrals, etc.) will be crowded out in transition periods where demand exceeds supply.

County probation departments are not currently staffed to handle large numbers of individuals who need assessment and referral to treatment. They will also take time to train staff, build in or contract for systematic assessment of the Proposition 36 referrals and to establish networks with providers whose programs may be appropriate.

Treatment providers and probation departments have different missions, cultures and little prior experience in working closely to accommodate a new mandate like Proposition 36. The extent to which actors in the treatment system are proactive in seeking referrals and offering assistance to probation may contribute to the success of the program. In other cases, we have seen that the need for building new interagency bridges was not recognized until late in the process of implementation.³⁸ Existing county administrators of drug and alcohol programs could play a critical role in linking probation departments with providers, and in making existing assessment centers available to probation. They may also provide an outreach function that may be needed to convince Proposition 36 offenders that the treatment option is one they want to pursue.

Quality of Care

Rapid growth in the number of treatment clients, and differences in the drug problems they present may have an impact on the quality of treatment

³⁷ California Legislative Analyst's Office (1999).

³⁸ New funding to provide treatment for women on welfare has gone largely unspent in California since welfare reform created the mandate in 1997 to provide treatment for work barriers such as addiction. Lack of interagency planning and coordination at the outset has lead to significant efforts to build better links between the welfare system and the treatment system.

provided. There are at least two possible ways in which quality could be affected. First, existing facilities will have greater caseloads. Without a corresponding increase in staff, the provider to patient ratio will fall. As a result, providers will not be able to have as much contact with each individual client as they did before the increase. Studies have shown that patients who receive more professional services have greater reductions in drug use and criminal behavior.³⁹ A second effect on treatment quality may come from the formation of new treatment facilities. New facilities may not have the same level of experience as the established facilities and as such, may not be able to provide the same level of quality of care initially. Evidence from evaluations of different treatment facilities suggests that characteristics such as leadership, organization, and staffing patterns are important aspects of treatment success.⁴⁰ Funding is another critical issue that affects quality of care and we examine two cost scenarios to try to estimate the funding adequacy in the next section. If quality of treatment is negatively affected in the short term, the benefits of treatment (and savings) projected above may take longer to realize.

Some Treatment Cost Scenarios

In considering the potential impacts of Proposition 36, the question arises as to whether the funding stream is sufficient to meet all of the costs. In order to forecast the cost of treating the criminal justice clients that Proposition 36 will generate, several assumptions have to be made. Since we cannot be sure what types of services the diverted population will require we will consider several possible scenarios. The cost forecasts below consider only the costs of treating the diverted population. The calculations do not include the potential criminal justice and societal cost savings that might be associated with drug treatment.

There are a couple of caveats associated with the scenarios presented below. First, because the scenarios are based on the number of estimated eligible offenders under Proposition 36, the scenarios represent estimates of treatment clients, not treatment episodes or admissions. The distinction is crucial because each client can have multiple treatment admissions. For example, an offender could complete three of six months of treatment in a program, only to relapse in to drug use. That offender, under Proposition 36, would be encouraged to re-commit to treatment to avoid incarceration.

³⁹ McClellan et al, (1996).

⁴⁰ McClellan et al, (1996).

However, depending on the severity of his relapse and the exact violations of the program rules, the offender may have to start treatment completely anew, or even start a different type of treatment program. In short, each offender eligible under Proposition 36 is likely to generate, on average, more than one treatment episode. The scenarios below are thus likely conservative estimates of treatment costs.

There is a second way in which the estimated costs in the scenarios may be conservative. They do not contain estimates of the number of misdemeanants who formerly would have received probation only but under Proposition 36 will be eligible for probation with treatment. Recall from an earlier section that the LAO's fiscal estimate did not include an estimate of the number these misdemeanants because they do not represent jail and prison diversions. To the extent that this number is large, the impact on treatment services will be correspondingly large.

High Treatment Need Scenario

In the first scenario we assume that the distribution of treatment modalities needed by the diverted population is the same as what has been provided in the prison setting.⁴¹ This scenario, therefore, implicitly assumes that Proposition 36 offenders have relatively more severe addiction problems than the current mix of community-based criminal justice referrals. According to the 1997 UFDS Survey of Correctional Facilities, of inmates in drug treatment, 26 percent receive care in specialized treatment units, 71 percent receive care in the general facility, and three percent receive care in a hospital or psychiatric unit. These treatment modes can be mapped into the modes available outside of the prison setting. The specialized treatment units correspond to long-term residential care, the general facility treatment corresponds to outpatient care, and the hospital unit corresponds to short-term inpatient residential care.

Modest Treatment Need Scenario

A second scenario is that where the distribution of treatment services for the Proposition 36 population more closely matches the distribution found in the current community-based treatment population. Data from the 1998 CADDS indicate that 65 percent of clients receive outpatient treatment, 22 percent received long-term residential treatment, 7 percent received day programming treatment, 4 percent received methadone maintenance, and 2 percent received hospital inpatient services.

⁴¹ At press, CADDS data on the distribution of *criminal justice* community treatment referrals across treatment modes was not available. We therefore chose the prison distribution as an approximation.

Table 1: Cost Estimates Based on Scenario 1

| Treatment Modality | % new clients by Tx mode | # clients ^a by Tx mode | Cost/day of Tx mode ^b | Typical length of stay by mode ^b | Total Cost (\$millions) |
|-----------------------|--------------------------|-----------------------------------|----------------------------------|---|-------------------------|
| Long-term residential | 26% | 9,360 | \$49 | 140 | \$64.2 |
| Outpatient | 71% | 25,560 | \$15 | 120 | \$46.0 |
| Short-term inpatient | 3% | 1,080 | \$130 | 30 | \$4.2 |
| Total | 100% | 36,000 | -- | -- | \$114.4 |

^a The # of new clients is based on the LAO estimate of 36,000 being diverted to treatment.

^b The cost per day and typical length of stay data are taken from estimates in the NTIES

Table 2: Cost Estimates Based on Scenario 2

| Treatment Modality | % new clients by Tx mode | # clients ^a by Tx mode | Cost/day of Tx mode ^b | Typical length of stay by mode ^b | Total Cost (\$millions) |
|-----------------------|--------------------------|-----------------------------------|----------------------------------|---|-------------------------|
| Long-term residential | 22% | 7,920 | \$53 | 140 | \$58.7 |
| Outpatient | 65% | 23,400 | \$7 | 120 | \$19.7 |
| Short-term inpatient | 2% | 720 | \$130 | 30 | \$2.8 |
| Methadone Maintenance | 4% | 1,440 | \$7 | 365 | \$3.7 |
| Day Programs | 7% | 2,520 | \$33 | 90 | \$7.5 |
| Total | 100% | | -- | -- | \$92.4 |

^a The # of new clients is based on the LAO estimate of 36,000 being diverted to treatment.

^b The cost per day estimates are taken from previous California Department of Alcohol and Drug Program calculations, except short-term inpatient which was taken from NTIES. Typical length of stay data are taken for the criminal justice population in California and are estimated from CADDs.

Scenario Implications

The simple cost models serve a couple of useful functions. First, they highlight that there will be tradeoffs in terms of the types of treatment that can be afforded under Proposition 36 if costs are to be kept within the funding provided by the initiative. Based on the first scenario, treatment of the Proposition 36 population will cost approximately \$114 million.⁴² Based on the second scenario, the total cost of treatment would be approximately \$92.4 million. This is against \$180 million available in the first 18 months, followed by \$120 million annually through fiscal year 2005-06. The second scenario results in lower costs than first due to less usage of high-cost inpatient and residential care. At a minimum, both of the scenarios suggest that a high proportion of the treatment will need to be outpatient services, even though the severity of drug problems may be more intense among the Proposition 36 clients than it is among the current community treatment caseload.

Second, the models suggest that claims for probation and court costs, in combination with treatment costs, could well exceed the available funding. Although no court or probation department provided us with official estimates of their likely claims if Proposition 36 is implemented, some in the major metropolitan areas spoke informally of requests in the millions. We have no verification that such claims will ultimately be made, but we raise them to point out that the potential for conflict over resources exists.

Finally, recall that the cost estimates from both scenarios are conservative because they count individuals rather than treatment admissions. The actual number of admissions under Proposition 36 could well exceed 36,000, resulting in proportionate changes in treatment costs. *

Response of Criminal Justice System Actors

Initiatives implemented by criminal justice system actors can have unintended consequences for at least two reasons. First, initiatives like Proposition 36 are typically written with general language intended to influence the behavior of the state's criminal justice system as a whole.

⁴² The judge overseeing the diversion of an individual may require the client to contribute to the cost of treatment if he/she is reasonably able to do so. It is also possible that the state will be able to negotiate lower daily costs for treatment than the averages used in the calculations above.

* We should also note that Proposition 36 allows the provision of other services such as employment training and so forth. These potential costs are not included in the scenarios. Thus, this is another way in which the cost estimates may be conservative.

However, in terms of the specifics of implementing a law, the state does not have just one criminal justice system but 58—one for each county. To the extent that some officials within these systems are permitted by the initiative and existing law to exercise discretion, implementation of the law could vary from what the initiative's writers intended and probably will vary from county to county. Discretion, after all, is subjective, and even similarly motivated and similarly guided people will differ in exercising subjective judgment. Where people are not similarly motivated, an initiative's allowance of discretion can serve as cover for the pursuit of varying agendas.

Second, system reform initiatives typically wind up generating some polarization. At least one party feels targeted and thus usually has a stake in maintaining the status quo, and the same may be true of other actors. This inertia provides a motivation for taking full advantage of whatever discretion is allowed to mitigate the effect of the newly legislated change. In addition, the inertia and the motivation it furnishes may not be entirely selfish. Even if the system is partly broken, the initiative may not change it in a way that increases social welfare, and players in the system may take action to blunt the new law's most damaging effects.

The Three-Strikes Example

California's 1994 three-strikes initiative is a good example of how criminal justice system behavior can vary in response to a new law. The intent of three-strikes proponents was to curb judicial discretion, which they saw as contributing to variations in sentencing of repeat offenders across jurisdictions, and particularly to sentences that they viewed as too short. The new law required a doubling of statutory sentences for those convicted of a serious crime who had previously been convicted of such a crime.⁴³ It also, most notably, required sentences of 25 years to life for those convicted of any felony that had twice been convicted of a serious crime. Judges were explicitly prohibited from removing prior convictions for serious felonies from the "strike" count.⁴⁴ Prosecutors, however, were allowed to waive prior strikes if they would have trouble proving them⁴⁵ or "in the furtherance of justice." Discretion was thus transferred from judges to prosecutors.

⁴³ In California, specific felonies are defined by law as "serious" (these include felonies defined by law as "violent").

⁴⁴ This provision was later struck down by the courts, but only after substantial cross-district variation in implementation of the law had arisen.

⁴⁵ Given the difficulty of locating records of prior convictions long in the past or from other jurisdictions, establishing such convictions for serious felonies is often not straightforward.

Prosecutors also retained their discretion over whether to charge certain crimes (e.g., petty theft) as felonies or misdemeanors, thus making defendants with two serious priors liable or not liable for a life sentence.

The debate over the three-strikes law was carried out by both sides largely under the assumption that the law would be fully implemented, i.e., that everyone eligible for enhanced sentences under the terms of the law would receive them. Early analyses by the California Legislative Analyst's office, the state Department of Corrections, and RAND all assumed full implementation. However, while hard data are difficult to come by, available evidence suggests that at least in the larger counties, prosecutors were from the outset waiving strikes at appreciable rates. Even in the stricter counties, prosecutors appear to have waived strikes in at least a quarter of the cases.⁴⁶ In Alameda County, it was actually policy to waive strikes in all cases in which the current crime was not serious, meaning that strikes were not counted in over half of cases eligible for application of the law. San Francisco, whose electorate voted against the three-strikes initiative, was reportedly even more lenient.

Prosecutorial discretion appears to have led to dramatic deviations in the effects of the law from what had been predicted on the basis of full implementation. RAND predicted substantial drops in crime and equally substantial rises in prison populations and thus in criminal justice system costs.⁴⁷ More recent RAND analyses have suggested that the three-strikes law may indeed have been responsible for part of the subsequent decrease in crime in California, controlling for other factors.⁴⁸ But prison populations have not been rising any faster and costs and other burdens on the criminal justice system seem to have smoothed out after an initial backlog in some counties. How could this be? One possible explanation is that prosecutors have been efficient at picking out individuals for whom to waive strikes. That is, they may have been waiving strikes for individuals who have turned out to be low-rate offenders and bringing the full force of the law to bear on persons who would have offended at higher rates had they returned to the streets.⁴⁹

⁴⁶ Perry and Dolan (1996), in reference to San Diego County.

⁴⁷ Greenwood et al., (1994)

⁴⁸ Based on analyses soon to be published. Analyses by others have suggested otherwise.

⁴⁹ Whether such discretion should be entrusted to prosecutors instead of judges is a legal and ethical question beyond the scope of this analysis.

Discretion under Proposition 36 Language

In the case of Proposition 36, there are two types of sources of discretionary action on the part of players in the criminal justice system: the language of the act and practices already in place on which the new law could impinge. With respect to the first, the act is not loosely written, but there are at least two possibilities for latitude, particularly given a motivated interpreter:

If a probationer or parolee participating in treatment under Proposition 36 is arrested for simple drug possession or use or violates a drug-related probation or parole condition, various factors influence his or her disposition. One factor requiring a revocation of probation or parole is a judgment by the court that the state has proven "by a preponderance of the evidence that the defendant poses a danger to the safety of others" (e.g., Sec. 1210.1(e)(3)(A)). The potential for differing interpretations here is clear and important. Some judges may interpret this provision narrowly to require that the defendant has threatened specific people through words or actions. Others may be satisfied with a pattern of behavior, present or past, suggesting the possibility of violence. A few may regard consumption of certain drugs as a danger to the safety of society at large. The number of participants finding themselves before a judge on such a charge is potentially large, given that treatment sometimes fails and that previous drug users have high rates of relapse. And it is noteworthy that the quoted provision applies when a defendant is *arrested* on a drug charge; conviction is not required.

If a participating offender violates probation for a second time, a second factor the court can consider in deciding whether to revoke parole is whether the state has proven that the defendant is "unamenable to drug treatment" [Sec. 1210.1(e)(3)(B)]. This provision is not as sweeping in its reach as the first. Fewer people will be subject to it, and a checklist is provided to help the court decide whether a defendant is unamenable to treatment. However, consideration of the checklist is optional. Given the same set of facts, some judges will probably be more willing than others to decide that a participant has proved "unamenable." (Probation may also be revoked if the participant's drug treatment provider notifies the probation department that he or she is "unamenable to the drug treatment provided and all other forms of drug treatment" [Sec. 1210.1(c)(2)].

Both of the preceding provisions permit judges and prosecutors with more punitive views of drug use to subvert the overall intent of the act in at least minor ways through broad interpretations. Similar attitudes, or desires to preserve as much of the status quo as possible, might influence actions taken under existing law in the presence of the new statutory provisions. These actions could result in a number of consequences apparently not intended by

the proponents, judging from their arguments and the language of the law they have prepared.

The Frequency of Possession-For-Sale Charges May Increase

The act explicitly excludes "possession for sale" from the drug offenses warranting treatment in place of incarceration. The act does not define "possession for sale." However, under existing case law and prosecutorial practice, possession of large quantities of drugs are often interpreted as suggestive of intent to sell. Possession of small quantities is usually taken to be indicative of personal use only. Though no hard data are available, it is likely that prosecutors bargain over cases where amounts possessed are intermediate and could conceivably be interpreted either way. They may reduce a charge from possession for sale to simple possession in exchange for a plea and a sanction at a certain level. Even where prosecutors believe possession for sale can be easily proved, they may accept a plea to simple possession, knowing that some a prison term could be secured without having to go to trial.⁵⁰ Under the initiative, however, all cases involving simple possession alone are to draw probation and treatment. If, *in the judgment of the prosecutor*, the defendant should draw a stronger sanction, there is no option but to bring the more serious charge of possession for sale. Whether such a charge is actually brought will depend on whether the evidence and the prosecutorial resources available are judged sufficient for a reasonable likelihood of victory at trial.

The Percentage of Simple-Possession Cases Going to Trial will Change Substantially

In cases where the quantity of drugs possessed and other considerations clearly rule out a charge of possession for sale, prosecutors can currently use the threat of incarceration as a bargaining chip: probation can be offered in exchange for a plea. Whether a defendant chooses trial or not depends principally on two things: first, whether the prosecutor's offer is attractive enough relative to the potential sanction following conviction at trial and, second, on the defendant's expectations of winning at trial.⁵¹ If the

⁵⁰ The Alameda County District Attorney infers from his office's review of a sample of simple-possession cases that *most* such cases resulting in prison sentences originally included charges of sale or possession for sale (Orloff, 2000). This finding is suggestive but not necessarily representative of California as a whole. It is possible that other district attorneys now take a harder line on plea-bargaining from sale-related drug offenses.

⁵¹ For innocent defendants, an important additional factor would be a reluctance to wrongly admit guilt. Such reluctance may apply even when expectation of success at trial is modest. However, this does
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prosecutor's offer is attractive enough and the defendant's expectations of winning at trial are low enough, the defendant will plead guilty, as apparently happens in most cases under current law. (Across all offenses, the great majority of convictions are achieved through pleas, and we have no reason to believe that simple-possession drug cases are any different.)

Proposition 36 reduces the options for sentencing following a simple-possession conviction to one: probation with treatment.⁵² Clearly, with only one option, there will be no bargaining. Defendants may still plead guilty if they want to escape drug dependence and see the terms of probation as a potentially effective motivating factor. Some defendants may judge the costs of mounting a defense at trial to be greater than the penalties under Proposition 36 (although the latter include the cost of treatment for those able to pay it). Alternatively, they may judge their chances of success at trial to be low enough not to warrant paying those costs, considering the modest Proposition 36 penalties. Because we cannot predict how defendants will compare trial costs and Proposition 36 penalties, we cannot predict whether the number of defendants choosing trial will remain as low as it is now (or even decrease) or whether it will increase. Poor, unemployed defendants, to whom trial costs may be negligible, would seem more likely to choose trial in greater numbers than they now do. For the rest, the situation is unclear.⁵³ What is clear is that sanctions between which defendants will choose will be dramatically different under Proposition 36, raising the possibility of substantial change in trial rates.⁵⁴

More Co-occurring Charges May Be Filed

It is likely that some prosecutors will not want to see persons guilty of drug possession or use "get off" with probation and treatment. In many cases, it is possible to charge a defendant with a variety of offenses, but only the more serious charges or those most likely to "stick" are actually brought. In such

not color the current analysis, because there is no reason to believe that the strength of this reluctance will change under Proposition 36.

⁵² Where the defendant has been convicted twice of simple possession or use and has been through two courses of probation and treatment, the court may sentence him or her to 30 days in jail. Defendants eligible for Proposition 36 may also render themselves ineligible by refusing treatment and taking the penalty under current law.

⁵³ Note this differs from the assumption in the LAO analysis (see the "Overview of Proposition 36").

⁵⁴ If the number of trials increases substantially, prosecutors may not have the resources to pursue them and may decide not to charge simple possession in many cases, thus freeing the defendant from probation and treatment. Such decisions would only increase the tendency of simple-possession defendants to choose trials.

cases, prosecutors may under Proposition 36 bring additional charges against a defendant who under current law would be charged only with simple possession or use. Under the initiative, if a defendant otherwise eligible for probation with treatment is convicted of any co-occurring felony or any co-occurring misdemeanor other than one related to drugs, he or she is ineligible. It is very likely that the propensity to bring co-occurring charges for this purpose will vary from one county to another. Prosecutors, after all, are elected officials, and, as apparent from the three-strikes example, they will to some degree reflect the ideologies of their constituents.

Some Persons Diverted will Escape the Initiative's Sanctions

As mentioned above, if a provider reports that a participant is unamenable to treatment, the probation department may move to revoke probation. It is unlikely, however, that all providers will report all such persons. In fact, the initiative does not require them to do so. Moreover, probation caseloads are already very high. A person who quits a treatment program is unlikely to draw the same kind of probation officer attention as a violent offender who does not meet his or her conditions. The initiative does allow that the funds to be appropriated for its purposes may be spent to support the additional probation caseload; however, we have already discussed the potential inadequacy of those funds. Thus, we think it probable that some of those convicted for simple possession or use through no great effort will escape the effective jurisdiction of the criminal justice system.

Discretion Inherent in Implementation

It is worth pointing out that Proposition 36 is not unique among initiatives or among statutes passed by the Legislature in the possibility that it will have unintended consequences arising from reactions by the criminal justice system. It is difficult and perhaps undesirable to write any law so as to prevent the exercise of discretion in its enforcement, and any kind of reform is bound to draw resistance from elements of the system being reformed. We point out the potential unintended consequences of Proposition 36 not to suggest that the law is unworthy (or worthy) of support but simply as a point of information for voters. It will also be important to be aware of such consequences when planning the evaluation of the initiative's effects that is required by its language.

SUMMARY AND RECOMMENDATIONS

Summary

At the beginning of this project, we set out to analyze four questions about Proposition 36:

- How many offenders will be eligible?
- What are the potential social costs and benefits associated with the proposition?
- How will the proposition affect treatment?
- How will the criminal justice system react?

Our findings are briefly summarized in the sections below, followed by presentation of some recommendations.

Number of Eligible Offenders

The number of offenders diverted under Proposition 36 is a key issue. The larger the number of diversions, the greater savings from reduced incarcerations. The Legislative Analyst's Office (LAO) prepared an estimate of potential diversions as part of its requirement to examine the fiscal effects that the proposition might have.

In our estimation, the LAO used reasonable assumptions to arrive at its diversion estimate. There are, however, two caveats that we must make, one concerning the LAO estimate and the other concerning an issue that was beyond the LAO's scope of analysis. With respect to the diversion estimate, it bears repeating that many California prosecutors are adamant that few, if any, simple possession and use offenders end up in prison. From the prosecutors' perspective, the majority of offenders in prison on simple drug use or possession charges are there because they pled down from drug trafficking or other charges. Some prosecutors report that they would be unwilling to plea down such charges in the Proposition 36 environment, and thus prosecutors are convinced that the LAO estimate substantially overstates the number of potential prison and, to a lesser extent jail, diversions.

With respect to issues beyond the LAO's scope of analysis, we noted earlier that there are thousands – and potentially tens of thousands – of drug offenders annually who currently receive straight probation. An unknown portion of these offenders will be eligible for probation plus treatment. The eligibility of these offenders for treatment will have no impact on the LAO fiscal estimate because they will not result in diversions from prison and jail. The number of these offenders will however, be a factor in determining how far the treatment dollars will go.

Social Costs and Benefits

It was beyond our scope to analyze all the potential social costs and social benefits associated with Proposition 36. Instead, we confined ourselves to examining the criminal justice social costs and benefits associated with the proposition. Namely, we examined the potential for crimes to be committed by offenders who would have been incarcerated prior to Proposition 36 (the social cost) and the potential for treatment to reduce not only drug use, but criminal behavior (the social benefit).

In general, it is difficult to find carefully studied populations comparable to the probable Proposition 36 population. Thus, it is correspondingly difficult to predict how Proposition 36 offenders will behave in the community. Studies of California probationers suggest that large fractions (about two-thirds) are rearrested while on probation, with about one-third getting rearrested in the first twelve months. Other studies show that California's arrested drug users (many of whom are good candidates for probation under current law) are highly likely to be involved in drug sales and other illegal activities at least in part to facilitate their habit. In short, there is evidence to indicate that the probation population is criminally active, and that we can anticipate that Proposition 36 participants will commit some crimes while they are out on release.

In contrast, the effectiveness of drug treatment in reducing drug use and criminal activity has been shown to vary with treatment modality, length of treatment, client motivation and treatment oversight. Treatment generates benefits not only by changing offenders' drug use and criminal behavior (potentially) over the long run, but by substantially changing these behaviors while the offenders are in treatment. Indeed, the benefits accumulated from changes in behavior during treatment appear to be as important as the benefits from long-run changes in behavior that treatment may bring about. One of the big unknowns with Proposition 36 offenders is how long they will stay in treatment, particularly if they are receiving low oversight.

The Proposition's Impact on the California Treatment System

There are a number of ways that Proposition 36 might affect the delivery of treatment in California. Some of the more important potential impacts are: potential changes in the mix of clients seeking treatment; the treatment system's ability to rapidly increase its capacity; the quality of treatment delivered under Proposition 36; and the ability to afford treatment for all eligible offenders with the resources provided under the initiative.

With respect to the mix of treatment clients, it seems clear that Proposition 36 will change the composition of criminal justice referrals to publicly funded treatment. The data suggest that future criminal justice treatment referrals under Proposition 36 will be less involved with heroin and more involved with amphetamines than current treatment clients. There are well-accepted treatment therapies for heroin users, but much less is known about how to treat amphetamine users. Generally, the likely differences between current and future criminal justice treatment referrals imply that the treatment community will need to alter its practices to work with the new clientele.

All available data indicate that the existing treatment system is inadequate for a large influx of new clients, and that additional capacity will have to be added to accommodate Proposition 36 clients. The treatment system's ability to rapidly expand its capacity is unclear. Of particular concern is the location of treatment monitoring responsibilities with probation departments. County probation departments are not currently staffed to handle large numbers of individuals who need assessment and referral to treatment.

Independent of the potential impact of rapid expansion, Proposition 36 has implications for treatment quality. There are at least two possible ways in which quality could be affected. In the immediate term, existing facilities will have greater caseloads, which will likely reduce interaction with patients until staff can be expanded. Second, new facilities may not have the same level of experience as the established facilities and as such, may not be able to provide the same level of quality of care initially.

Finally, we developed two treatment cost scenarios to assess how the resources provided under Proposition 36 compare to the potential increase in treatment demand. Using the LAO estimates as a baseline, our projections show that Proposition 36 treatment services will cost between \$92 and \$114 million. Proposition 36 provides \$60 million in transitional funding, and \$120 million for treatment services thereafter for the life of the initiative. The proposition allows the courts and probation to claim a portion of the initiative's resources to offset potential increases in caseloads and processing costs. While no probation department or court provided us with estimates of their projected increased costs, it is reasonable to anticipate that these

organizations' claims will total in the millions, and perhaps tens of millions, of dollars. The sufficiency of Proposition 36 resources to cover the client base may thus largely depend on the resource claims made by the courts and probation.

There are two reasons to believe that our treatment cost scenario estimates may be low or conservative. The first is that we based our cost scenarios on the LAO's estimate that 36,000 offenders will be diverted under Proposition 36. Recall that the LAO's estimate, because it was designed to estimate fiscal impacts, did not include the misdemeanants currently receiving straight probation who might be eligible for probation with treatment. Thus, if the LAO diversion estimate is correct, the underlying population eligible for treatment could be substantially larger than the 36,000 used in the cost scenarios once these misdemeanants are incorporated. The potential impact of these misdemeanants may be offset to the extent that the LAO estimate of prison diversions is high.

The second more technical reason that the cost scenarios are conservative is that they are oriented around individuals, not treatment admissions. Experienced treatment professionals know that, on average, each individual participating in treatment represents more than one treatment admission. This is because many individuals relapse into drug use during the course of treatment and thus may fall out of, and reenter, treatment multiple times. The framers of the initiative explicitly anticipated this pattern. The result, however, is that 36,000 offenders assumed eligible for treatment in the scenarios may represent a substantially larger number of treatment admissions and thus substantially higher treatment costs. We cannot bound the potential number of treatment admissions.

Taken together, these two caveats suggest that Proposition 36 treatment will need to be weighted toward less expensive forms of therapy to stay within the resources provided by the initiative.

Criminal Justice System Reaction

Experience with "Three Strikes" in California suggests that Proposition 36, if it passes, will be implemented with varying degrees of fidelity across California's counties. Differences will emerge where the initiative language is unclear and requires interpretation, or where the initiative allows discretion. We cannot predict the magnitude that the collective exercise of discretion will have on the implementation of Proposition 36, but we can point to some areas where we can expect to see the effects.

Offenders are ineligible for Proposition 36 for a variety of reasons, including if they are convicted of drug sales offenses. Thus, one outcome of the

implementation of Proposition 36 is that we might see an increase in possession-for-sale charges. Indeed, some prosecutors have already indicated that they would pursue this strategy in part because the initiative does not allow alternatives (from the prosecutors' perspective) for individuals who would like to plead down to drug use and possession charges. Similarly, Proposition 36 will almost certainly affect the amount of plea bargaining that occurs and, consequently, the percentage of simple-possession cases going to trial. Prosecutors may also increase the frequency with which they file co-occurring charges against offenders. Finally, it seems clear that some offenders diverted to community-based treatment will evade sanctions. Currently, probation departments are already having difficulty managing their caseloads and ensuring that probationers are carefully monitored.

Recommendations

Whether Proposition 36 passes or fails, it has raised an issue that is of importance in California and is likely to be of interest to other states. In light of that likelihood, we present some recommendations below.

If Proposition 36 Fails

Conduct a Pilot

We believe that there is merit to examining the impact that a program such as Proposition 36 might have on drug use, criminal justice system costs, and social costs. On the latter point, it seems especially important to design a pilot that allows measurement of both the social costs averted (in terms of public health improvements and other such measures) by treating offenders and the social costs incurred (in the form of crimes committed, etc) by diverting offenders who would otherwise be incarcerated to community-based treatment.

There are other benefits to a pilot program. Perhaps most importantly, it would allow for a more structured measurement of treatment effectiveness on the Proposition 36 population. We know little about how this population will respond to treatment in general, let alone to the mix of treatment that will be offered under Proposition 36. Second, a pilot program would allow policy makers to develop a better understanding of how court and probation costs will be influenced by the proposition. The objective here would be to ensure that a complete model of costs was developed so that any future larger-scale program would be properly resourced. Third, a pilot program would identify implementation problems and solutions that would facilitate implementation of a larger scale effort in the future.

Analyze the Adjudication Experience of the Typical Drug Offender⁵⁵

US drug policy is often criticized for locking up many first-time, non-violent offenders and many offenders whose only crime is drug use or possession. Certainly some people in prison fit that description, but it also apparent (from conversations with prosecutors and other members of the criminal justice system) that some portion of those in prison for drug possession have circumstances that are masked in the official statistics. Indeed, the Alameda County District Attorney determined that more than one half of the offenders sentenced to prison for drug use from Alameda County in fact pled their charges down from a drug sale or other offense.⁵⁶

In any regard, it is clear that the "superficial" statistics do not necessarily describe the entire situation. The idea is to get down to a level of information beyond that which is available in the usual statistics and, in the process, develop a description that can be used to inform policy formulation.

Analyze Probation

Nationally, more than 3 times as many people are on probation as are behind prison bars. Despite probation's potential role in preserving public safety, we have little systematic knowledge about how probationers behave, how to improve compliance with terms of probation, or, indeed, even what the right mission for probation is.⁵⁷ Given the responsibilities placed on probation as a function of Proposition 36, it makes sense to re-examine probation's efficacy and resource needs.

Evaluate Current Treatment Efforts

In 1999, over 50,000 court and other criminal justice referrals were admitted to California treatment programs. Half of them were on probation. State policymakers could turn to existing data on this population's experience in treatment and their criminal justice histories to project more precisely the likely outcomes of greatly expanding the number of probationers and parolees in treatment. It would be useful to know how many of those admitted complete their episode of treatment and how many drop out. It would also be helpful in projecting costs to understand better their time in

⁵⁵ Acknowledgment must go to RAND colleague Jonathan Caulkins who provided many of the ideas proposed in this section.

⁵⁶ Orloff (2000).

⁵⁷ US Department of Justice (1998).

treatment and whether they receive additional episodes of treatment. As noted above, it would be important to link criminal justice histories of various types to the treatment experience in order to estimate outcomes for different sources of the Proposition 36 population (i.e., misdemeanants versus felonies, and so forth).

If Proposition 36 Passes

If Proposition 36 passes there are still a number of steps that should be taken. Some of the recommendations provided below may require formal modification of the proposition, and thus action by the Assembly. In all cases, we regard these suggestions consistent with the spirit and intent of the initiative.

Establish a Baseline

It is urgent that policy makers establish a baseline of what is happening statewide to drug offenders, particularly misdemeanants. Currently, the disposition of misdemeanor offenses and patterns of prosecutorial plea bargaining are not routinely available. Without careful documentation of the former prior to the implementation of Proposition 36, it will be impossible to determine if prosecutors are implementing changes in charging patterns through the filing of more co-occurring charges and other practices. Similarly, without careful documentation of plea bargaining practices prior to the implementation of the proposition, it may be difficult to determine if prosecutors alter their plea patterns in the face of implementation of the proposition.

One question that the evaluators must answer is what types of criminal histories do Proposition 36 participants go on to *after receiving services under Proposition 36* and how does that compare to *criminal career progression pattern that existed prior to the implementation of Proposition 36*? This is another way of saying that we need to be able to measure the impact that probation-based treatment has on criminal career progression, but that will be difficult to do without building an adequate baseline of both probation activity and offenses that currently largely result in probation sentences.

Conduct A Treatment Needs Assessment

No one knows the rate of drug dependence or drug abuse among those who would be eligible for Proposition 36 services. Careful planning to meet these needs over the next several years requires an assessment of the severity of drug problems among the population as well as other problems such as poor education, lack of job skills, mental illness and other health problems and parenting experience. This information would contribute to planning for treatment expansion needed to meet this new source of referrals. As noted

above, the needed funding for treatment is difficult to estimate at this stage. With a thorough needs assessment a much finer evaluation of current treatment availability and funding could be made to ensure that the program is launched with the necessary funding in place for probation departments and treatment programs.

Eliminate the Drug Test Exclusion or Provide Drug Testing Funds

As written, Proposition 36 prohibits the use of funds provided by the initiative for drug testing. The authors have noted in other forums that the language expresses their philosophical opposition to drug testing and their sense that drug testing is already widely available. Nevertheless, they point out that they did not mean to prohibit Proposition 36 clients from being drug tested, only to prohibit Proposition 36 funds from being used on drug testing. As a practical matter, unless this exclusion is eliminated or a separate drug testing appropriation is provided for, treatment providers, probation and parole officers and the courts will have to pull resources from other treatment and criminal justice programming sufficient to cover increased drug test costs.

Drug testing is an accepted practice, and a useful tool for monitoring progress and compliance with a treatment program especially in outpatient settings. It is also widely accepted and practiced among probation and parole offices. Given that Proposition 36 locates the bulk of monitoring responsibility with probation and parole, it is logical to ensure that these entities have the resources necessary to execute their new responsibilities in an effective manner as possible. Unless drug testing is readily available, those monitoring treatment progress must rely on self-report. Given the public investment required to support this initiative, it seems reasonable that an objective measure, such as drug testing, be integrated into the program.

Establish Procedures for Monitoring Treatment Quality

The quality and the value of the treatment provided under Proposition 36 should be assessed as part of the mandatory evaluations. However, given the level of public investment in treatment that the initiative requires, we believe it is necessary to implement a quality assurance mechanism that governs the day-to-day administration of treatment. The proposition allows state officials to take Proposition 36 resources for purposes of "providing drug treatment programs under this Act."⁵⁸ We believe that this clause should be

⁵⁸ Countywide Criminal Justice Coordination Committee of Los Angeles County (2000).

interpreted to include developing 'quality of treatment' standards and that the interregnum between passage and commencement of Proposition 36 provides the opportunity for their development.⁵⁹

In addition, the probation departments, or their contractors, will need to adopt screening and assessment procedures to determine need for drug treatment and appropriate programs for referral. Rather than inventing a new system, these activities should be undertaken in close coordination with existing assessment and referral networks that are already in place in many counties. The 58 County Department of Alcohol and Drug Programs and the local providers who deliver treatment services have years of relevant experience with outreach, screening, assessment and treatment progress monitoring. Their extensive involvement will be invaluable in planning to accomplish the large numbers of Proposition 36 offenders. Treatment organizations such as the California Department of Alcohol and Drug Programs, the County Alcohol and Drug Program Administrators Association of California and the California Association of Drug Program Executives could help ensure that appropriate standardized assessments and performance measures are incorporated in contracts for treatment services and that there is some consensus and consistency across counties in these materials.

⁵⁹ The California Department of Corrections drafted such standards in 1996 but they were never implemented.

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